IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 302 of 1990

with

CRIMINAL APPEAL No 303 of 1990

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL
and
Hon'ble MR.JUSTICE SHARAD D.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

STATE OF GUJARAT

Versus

DILIPBHAI @ DINESHBHAI BAROT

Appearance:

MR KC SHAH, APP for the appellant-State

NOTICE SERVED for Respondent No. 1

CORAM : MR.JUSTICE J.M.PANCHAL
and
MR.JUSTICE SHARAD D.DAVE

Date of decision: 10/04/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE J.M.PANCHAL)

In Sessions Case No. 15/89, the respondent was tried by the learned Sessions Judge, Sabarkantha at Himatnagar for the offences punishable under sections 363, 366 & 376 of the Indian Penal Code. By judgment dated February 15, 1990, learned Sessions Judge has acquitted the respondent of the offences punishable under sections 363 & 366 of the Indian Penal Code, but convicted him of the offence punishable under section 376 of the Indian Penal Code and sentenced him to suffer R.I. for a period of two years and fine of Rs. 2000/-, in default, R.I. for six months. In Criminal Appeal No. 302/90, the State has questioned acquittal of the respondent of the offences punishable under sections 363 & 366 of the Indian Penal Code; whereas in Criminal Appeal No. 303/90, prayer made by the State Government is that sentence imposed on the respondent under section 376 I.P.C. being inadequate, should be suitably enhanced. As common questions of facts and law arise for our consideration in these two appeals, we propose to dispose them of by this common judgment.

2. Complainant Harshadkumar R. Jayswal is a resident of village Bayad and dealing in business of electrical wiring. He was married to Pushpaben, daughter of Kanaiyalal Motilal Jayswal of Cambay. During the subsistence of the marriage, Pushpaben gave birth to two children, eldest of whom was daughter named Kamini. Kamini was studying in New S.S.C.Class. Before three months of lodging of the complaint, Mr. H.P.Joshi, who was the Principal of Bayad Highschool, had called the complainant in the school and informed him that his daughter Kamini and respondent were seen talking in an unusual manner in a garden and, therefore, he should take necessary action to check the activities of his daughter. The complainant and his wife Pushpaben had thereupon reprimanded Kamini and had asked the father of the respondent to rebuke the respondent and warned the respondent not to indulge in such activity. Before a week of the incident, when Kamini was on her way to school, the complainant was going home from his shop and when he came near old S.T.Stand of Bayad, he saw that the respondent and Kamini were talking near a culvert. The complainant thereupon scolded the respondent and rebuked as to why he was talking with his daughter, but according to the complainant, the respondent began to quarrel with him, whereupon the complainant called the father of the

respondent, but his father also began to quarrel with the complainant. According to the complainant, the respondent gave abuses and threatened him that he would take away or entice away his daughter at any time and the complainant would not be able to do anything in the matter. The incident in question took place on October 10, 1988. On that day, the complainant had gone to Kaswada in Malpur Taluka at the house of his maternal uncle, as the maternal uncle was to end Navratri Fast and came home at about 6.00 P.M. The father of the complainant told the complainant that the complainant's wife Pushpaben had gone for her job, as she was serving as a school mistress; whereas Kamini was not found in the house since 10.00 A.M. The complainant made inquires with his relatives, but Kamini could not be found. When the complainant went to the house of the respondent, he found that the respondent was also not in the house. In view of the previous conduct of the respondent, complainant legitimately concluded that the respondent had enticed away his daughter and, therefore, lodged complaint with Bayad Police Station against the respondent. Initially, offence under section 363 I.P.C. was registered against the respondent and investigation was entrusted to P.S.I. Mr. R.D.Marathe. The investigating officer could secure the custody of Kamini and after obtaining medical opinion, concluded that the respondent had also committed offence punishable under section 376 I.P.C. Therefore, at the conclusion of the investigation, the respondent was chargesheeted for the offences punishable under sections 363, 366 & 376 of the Indian Penal Code. As the offences punishable under sections 366 & 376 I.P.C. are triable by a Court of Sessions, the case was committed to Sessions Court, Sabarkantha at Himatnagar for trial, where it was numbered as Sessions Case No. 15/89. Charge for the offences punishable under sections 363, 366 & 376 I.P.C. was framed by the learned Sessions Judge against the respondent. The charge was read over and explained to the respondent, who pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, examined; (i) Dr.P.P.Soni as P.W.1 at Exh.11, (ii) Dr. A.M. Raval as P.W.2 at Exh.16, (iii) Manjiben Chelaji as P.W.3 at Exh.21, (iv) complainant Harshadkumar R. Jayswal as P.W.4 at Exh.23, (v) Principal of the School Shri Harivadan P.Joshi as P.W.5 at Exh.26, (vi) prosecutrix Kaminiben H. Joshi as P.W.6 at Exh.29, (vii) Ramlal Khedulal as P.W.7 at Exh.40, (viii) Rajdhar Dolatram Marathe as P.W.8 at Exh.41, and (ix) Amrutbhai Chandubhai as P.W.9 at Exh.42, and also produced documentary evidence, such as - panchnama relating to seizure of clothes of the prosecutrix as well as that of

the respondent, report of the analyst, certificate relating to age of the prosecutrix, birth certificate of the prosecutrix, complaint lodged by Harshadkumar, extract of register produced by the Principal of the school to establish the age of the prosecutrix, ten love letters written by the prosecutrix to the respondent Exhs.30 to 39 respectively etc. to prove its case against the respondent. After examination of prosecution witnesses was over, the learned Judge recorded the statement of the respondent under section 313 of the code. In his further statement, the respondent maintained that the case of the prosecution against him was false. However, he did not examine any witness in support of his defence.

3. On appreciation of evidence of Dr. A.M.Raval and medical test carried out by him for ascertaining the age of the prosecutrix as well as extract of school register produced by the Principal of the school and certified copy of birth certificate of the prosecutrix, the learned Judge held that on the date of the incident i.e. on October 21, 1988, the prosecutrix was about 14 years, 9 months and 14 days of age. The learned Judge referred to the evidence of complainant Harshadkumar, Principal Mr. H.P.Joshi as well as love letters on record and concluded that the prosecutrix was in love with the respondent and she had voluntarily joined the respondent, but the respondent had not enticed her away from keeping of her lawful guardian and, therefore, offences punishable under sections 363 & 366 I.P.C. were not made out against the respondent. The learned Judge thereafter referred to medical evidence on record as well as the evidence of the prosecutrix and deduced that the respondent had sexual intercourse with Kaminiben with her consent, but as she was under 16 years of age, the respondent had committed offence of rape punishable under section 376 I.P.C. The learned Judge heard the respondent regarding sentence to be imposed and after taking into consideration the relevant circumstances, sentenced the respondent to suffer R.I. for two years and fine of Rs. 2000/-, in default, R.I. for six months, by judgment dated February 15, 1990, which has given rise to these two appeals.

4. Mr. K.C.Shah, learned A.P.P. after taking us through the entire evidence on record submitted that the respondent had kidnapped Kaminiben from her lawful guardianship with intent that she might be compelled to marry him against her will or seduced to illicit intercourse and, therefore, the respondent ought to have been convicted of the offences punishable under sections 363 & 366 I.P.C. Referring to the enhancement of

sentence, the learned counsel pleaded that the sentence of R.I. for two years imposed on the respondent for the offence punishable under section 376 I.P.C. is grossly inadequate and having regard to the facts of the case, the sentence should be suitably enhanced.

5. Though served, none appears on behalf of the respondent. We may state that after service of notice in appeal, office had written a letter to the respondent asking him to inform the office whether any arrangement should be made by the office for appointment of a counsel to plead his case, but the respondent had in his reply stated that he would like to be defended by an advocate of his choice and, therefore, no one was appointed by the office to plead the case of the respondent before the Court.

6. We have heard the arguments advanced by the learned counsel for the State and taken into consideration the evidence on record. The evidence of complainant Harshadkumar P.W.4 Exh.23 indicates that he was informed by the Principal of Bayad Highschool that his daughter was found talking in an unusual manner with the respondent and that he should check her activity. His evidence also shows that though he had scolded the prosecutrix, the prosecutrix had continued to meet the respondent and therefore, her studies were required to be discontinued. The evidence of Principal of Bayad Highschool Mr. Joshi P.W.5 Exh.26 shows that the prosecutrix was leaving the school when it was in session and was chitchatting with the respondent. Ten love letters produced by the prosecution itself on the record of the case would indicate that the prosecutrix had love and affection for the respondent. The admissions made by the prosecutrix in her cross-examination make it evident that she herself had agreed to accompany the respondent and had gone to the house of sister of the respondent of her own free will. She also admitted that she was in love with the respondent and had addressed letters to the respondent after he was arrested in connection with the incident in question. Thus, the finding recorded by the learned Judge that the respondent had not kidnapped Kaminiben or not removed her from lawful guardianship is eminently just and is hereby upheld. So also, the finding that the respondent had not kidnapped Kaminiben with intent that she might be compelled or that she would be compelled to marry the respondent is also upheld, as the same is supported by the evidence on record. The learned Judge has given cogent and detailed reasons in Paras 9 to 18 of the judgment for coming to the conclusion that no case is made out against the

respondent for the offences punishable under sections 363 & 366 I.P.C. with which we fully concur. In S.Varadarajan v. State of Madras, AIR 1965 S.C. 942, distinction between 'taking' and 'allowing' a minor to accompany a person has been nicely explained and it is held that two expressions are not synonymous. What is ruled in the said decision is that where a minor leaves her father's protection, knowing and having capacity to know the full import of what she is doing and voluntarily joins the accused person, the accused cannot be said to have taken her away from the keeping of her lawful guardian. Again in Thakorlal D.Vadgama v. State of Gujarat, AIR 1973 S.C. 2313, scope of section 361 I.P.C. is explained and it is held that the word 'entice' seems to involve the idea of inducement or allurement by giving rise to hope or desire in the other, but if the minor leaves her parental home completely uninfluenced by any promise, offer or inducement emanating from the guilty party, then the latter cannot be considered to have committed the offence of kidnapping. The evidence on record does not establish that minor Kaminiben had left her parental home influenced by any promise, offer or inducement made by the respondent. The evidence on the contrary establishes that she had left her parental home of her own and completely uninfluenced by any promise, offer or inducement emanating from the respondent. Therefore, in our view, the learned Judge did not commit any error in not convicting the respondent of the offences punishable under sections 363 & 366 of the Indian Penal Code. The acquittal appeal has, thus, no substance and liable to be rejected.

7. So far as offence punishable under section 376 I.P.C. is concerned, we find that the evidence of prosecutrix recorded at Exh.29 establishes that Kaminiben had sexual intercourse with the respondent in the night between October 22, 1988 and October 23, 1988 at the instance of the respondent. On medical examination, rupture of the hymen of Kaminiben was found. We have examined the plea which was raised on behalf of the respondent that absence of injuries either on Kaminiben or on the respondent would necessarily go to show that there had been no sexual intercourse with Kaminiben by the respondent. However, we are of the view that the learned Judge was justified in rejecting the said argument. It may be stated that Kaminiben was a well developed child and was having even her menstrual periods. She had, in fact, accepted the respondent as her husband and had eloped with him possibly to marry him. When the respondent and Kaminiben had a chance in a solitary room to be alone at the house of sister of the

respondent, the respondent had sexual intercourse with Kaminiben. Kaminiben had permitted the respondent to have sexual intercourse with her as is evident from her testimony. In such circumstances, absence of injuries in the vaginal passage or on other parts of person of the prosecutrix, would be of no consequences and would not and cannot lead to a conclusion that the offence of rape was not committed by the respondent. This question squarely stands answered by the decision of the Supreme Court in Gurcharan Singh v. State of Haryana, AIR 1972 SC 2661 and applying the principle laid down in the said decision to the facts of the present case, we find that the learned Judge was perfectly right in convicting the respondent under section 376 I.P.C. We concur with the detailed reasons recorded by the learned Judge in Paras 19 to 22 of the judgment, in which it is concluded that the respondent has committed offence punishable under section 376 I.P.C.

8. So far as sentence imposed on the respondent for the offence punishable under section 376 I.P.C. is concerned, we find that the learned Judge has recorded cogent reasons for sentencing the respondent to R.I. for two years and fine of Rs. 2000/-, in default, R.I. for six months. The record indicates that Kaminiben was very much attached to the respondent and had continued her affairs with him, though she was scolded by her father. She herself had left parental home and joined the respondent and thereafter had gone to Barot na Muvada where sister of the respondent was residing. It is true that the respondent had deflowered Kaminiben, but the learned Judge has rightly taken into consideration the circumstances such as young age of the respondent and the manner in which the incident had taken place before imposing sentence under section 376 of Indian Penal Code. The discretion exercised by the learned Judge while imposing sentence cannot be termed as arbitrary exercise of power to impose sentence,nor sentence imposed can be regarded as inadequate so as to warrant our interference in enhancement appeal. On overall view of the matter, we are satisfied that no case is made out by the prosecution to enhance the sentence after a period of 10 years, more particularly having regard to the conduct of prosecutrix Kaminiben. The enhancement appeal also, therefore, is liable to be rejected.

For the foregoing reasons, both the appeals fail and are dismissed. Muddamal articles no.1 to 8 to be disposed of in terms of directions given by the learned Judge below Exh.47.

(J.M.Panchal,J.)

(S.D.Dave, J.)

(patel)